Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Misc. No. 1037

JANAF, INCORPORATED,
Petitioner,

vs.

VICTOR J. ORSINGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Janaf, Incorporated, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on November 30th, 1964.

OPINIONS BELOW

The Court of Appeals did not write an opinion. The said Court of Appeals entered its order dismissing the appeal on November 30, 1964. A copy of said Order is printed in the Appendix hereto, infra, page 8.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 30, 1964. The time for filing petition for a writ of certiorari herein was extended to and including April 1, 1965, by an order of this Court entered on March 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in dismissing the appeal of petitioner.

2. Whether the District Court erred in the entry of its order of June 1, 1964, dismissing petitioner's second amended complaint.

3. Whether the District Court properly applied Rule 6 (a) of the Federal Rules of Civil Procedure, in dismissing petitioner's second amended complaint.

4. Whether the District Court erred in denying petitioner the right to be heard in opposition to the Motion for Summary Judgment.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 6(a), as amended January 21, 1963, effective July 1, 1963, provides, inter alia, as follows: "(a) *computation.* In computing any period of time prescribed or allowed by these Rules, by the local Rules of any District Court, by order of Court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday."

Rule 56(b): *For defending party.* "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

U. S. Appeals D. C. Rules

Rule 16(b). *Statement of Appellant and Appellee as to Contents of Joint Appendix.*

"Within 10 days after the filing of the record appellant shall serve and file with the Clerk a statement of the parts of the record he proposes to print in the joint-appendix. Within 10 days after the filing of appellant's statement, appellee shall serve and file a statement of the parts of the record not included in appellant's statement which appellee desires to have printed in the Joint-appendix."

Rule 16(g). *Matters inadvertently omitted may be added.*

"If anything material to the appeal is inadvertently omitted from the joint appendix, the Clerk on the written request of any party duly served and filed prior to the expiration of the time for filing the reply brief may allow the joint-appendix to be released to the printer for the purpose of adding such matter thereto."

STATEMENT

Petitioner filed his appeal in the Court of Appeals from a judgment of the District Court which failed to compute the time in accordance with Rule 6(a) of the Federal Rules of Civil Procedure, as amended January 21, 1963, effective July 1, 1963. That thereafter and in accordance with the provisions of Rule 16(b) of the Rules of the Court of Appeals, the petitioner filed its designa-

tion of the portions of the record for inclusion in the joint-appendix, on August 10, 1964. That thereafter, on October 7, 1964, petitioner filed its brief on joint-appendix in the Court of Appeals. That through inadvertance, parts of the record designated by petitioner for inclusion in the said joint-appendix were omitted therefrom. That before petitioner could comply with the provisions of Rule 16(g) of the rules of the Court of Appeals, and, on October 9, 1963, the respondent filed his motion in the Court to dismiss the appeal, because of the said omissions referred to above. The petitioner's opposition to the said motion to dismiss, filed by the respondent, pointed out its readiness to withdraw the said joint-appendix, then, on file, and amend same so as to include those portions of the records inadvertently omitted, or in the alternative, to have the respondent include such portions of the record, in his appendix. (Appendix, Infra, pages 15-19 inclusive).

The Court of Appeals without a consideration of the merits of the appeal, dismissed petitioner's appeal on November 30, 1964. The petitioner was thereby denied its right to be heard on the merits of its appeal and as a result of such denial its petitions this Court for a writ of certiorari to issue to the United States Court of Appeals for the District of Columbia Circuit to correct the judgment of that Court by reinstating the appeal.

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals in dismissing petitioner's appeal not only denied due process of law to the petitioner, but also ignored its own Rule 16(g). As set forth above Rule 16(g) of the Rules of the Court of Appeals affords the party litigants the opportunity prior to the time for filing the reply brief to: "allow the joint appendix to be released to the printer for the purpose of adding such matter thereto." The failure of the Court of Appeals to apply the provisions of said Rule 16(g) de-

nied the petitioner the equal protection of the law as guaranteed under the fourteenth amendment to the Federal Constitution and consequently violated the due process clause of the fifth amendment to the said constitution. Moreover Rule 16(a) of the Court of Appeals provides in part that: "Appellant shall print in the joint appendix the relevant docket entries in the district court . . . ., the complaint and those portions of the pleadings which are relevant to the issues in the case, then judgment or order appealed from, and the notice of appeal, . . . and such other parts of the Record Material to the Points on Appeal as the appellant desires the Court to read in order to decide the questions presented". Petitioner contends that the only issues presented to the Court of Appeals for determination were: Whether the Trial Court properly computed the time under Rule 6(a), as amended January 1, 1963, effective July 1, 1963, and whether the Trial Court erred in denying petitioner the right to be heard before dismissing the second amended complaint. Petitioner asserts that the joint appendix was adequate for the purpose of determining those issues. Under the order entered April 23, 1964, the Trial Court gave petitioner 30 days from April 23, 1964, to engage counsel and have the appearance of counsel entered in the cause. The 30th day expired on May 23, 1964, which fell on a Saturday, and under said Rule 6(a) the time was automatically extended to Monday, May 25, 1964. (App., Infra, page 10).

The order of the Trial Court dismissing the second amended complaint entered June 1, 1964, provides that the dismissal is premised on the failure of petitioner to cause the appearance of its counsel to be entered within thirty days from April 23, 1964. (App., Infra, page 12). The appearance of counsel for petitioner was entered in the Trial Court on May 25, 1964. The said appearance was entered within the thirty days provided under the

order of April 23, 1964. A cursory computation of said Rule 6(a) discloses the correctness of same.

This Court has held in analogous matters that where the order of Court is relied upon by the party, it is error for the Court of Appeals to dismiss the appeal. Harris Truck Lines, Inc., vs. Cherry Meat Packers, Inc., 1962, 371 U.S. 215. Here the petitioner relied on Rule 16 of the Rules of the Court of Appeals, hence "The Court of Appeals ought not to have disturbed" petitioner's appeal. Reliance on the provision of the order of the Trial Court entered April 23, 1964, to the effect, that petitioner would have thirty days within which to engage counsel and have his appearance entered, is entitled to the protection of this Court. Thompson vs Immigration and Naturalization Service, 1964, 375 U.S. 384. In the latter case this Court referring to the "Harris" case, supra, said that: "In that case petitioner had, within the applicable period for filing his appeal, received from the Trial Court a 30 day extension on the time for filing his appeal on the ground of 'excusable neglect based on a failure of a party to learn of the entry of the judgment'. . . . . petitioner then filed his appeal within the period of the extension but beyond the original period. The Court of Appeals, concluding that there had been no excusable neglect. . . held that the District Court had erred in granting the extension and dismissed the appeal. We reversed the dismissal and remanded the case to the Court of Appeals 'so that petitioner's appeal may be heard on its merits' ". This Court reversed the Court of Appeals in Wolfsohn vs Hankin, et al., 1964, 376 U.S. 203, where the Court of Appeals dismissed the appeal without permitting the petitioner to be heard on the merit.

The petitioner's grievances, therefore, are two-fold. First, the Trial Court's order entered April 23, 1964, gave petitioner 30 days within which to have the appearance of its counsel entered. Petitioner complied with the

foregoing order and had every reason to rely thereon. Secondly, with the above presenting the principal issue for determination by the Court of Appeals, the petitioner had every right to rely on the liberalty of the rules of the Court of Appeals described above.

CONCLUSION

For the foregoing reasons, the petitioner urges the granting of this petition for a writ of certiorari.

Respectfully submitted,

WINFRED R. MUNDLE
Attorney for Petitioner
715 "G" Street, N. W.
Washington, D. C.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,813

* * * *

ORDER

On consideration of appellee's motion to dismiss and of appellant's motion for leave to file an opposition thereto, the time having expired, it is

ORDERED by the court that appellant's aforesaid motion for leave to file its opposition be granted, and the Clerk is directed to file appellant's lodged opposition, and on consideration whereof, it is

FURTHER ORDERED by the court that appellee's aforesaid motion to dismiss this appeal be granted, and this appeal is dismissed.

Per Curiam.

Dated: Nov 30 1964

* * * *

[Filed August 10th 1964]

DESIGNATION OF PORTIONS OF RECORD FOR INCLUSION IN JOINT-APPENDIX

The above-named appellant designates the following portions of the Record for inclusion in the Joint-Appendix:

1. The Complaint, filed January 12, 1963.
2. The Answer, filed January 29, 1963.

3. Motion For Summary Judgment, filed June 12, 1963.
4. Order For Production, etc., filed September 10, 1963.
5. Order Dismissing Complaint, filed September 18, 1963.
6. Amended Complaint, filed September 23, 1963.
7. Motion to Dismiss Amended Complaint, filed October 4, 1963.
8. Plaintiff's Motion to Dismiss, filed October 11, 1963.
9. Order Granting Motion to Dismiss, filed November 7, 1963.
10. Second Amended Complaint, filed November 16, 1963.
11. Answer to Second Amended Complaint, and Motion to Dismiss, filed November 22, 1963.
12. Motion for Leave to Withdraw, filed January 2, 1964.
13. Order Giving Ten (10) Days, filed April 8, 1964.
14. Memorandum Vacating Order entered April 8, 1964, filed April 9, 1964.
15. Application for Extension of Time, filed April 9, 1964.
16. Order Filed April 23, 1964, directing party to retain counsel within thirty (30) days.
17. Appearance of R. B. Rosenbury for plaintiff, filed May 25, 1964.
18. Order Dismissing Second Amended Complaint, filed Jun 1, 1964.
19. Motion of Plaintiff to Reconsider, filed June 3, 1964.
20. Notice of Appeal, filed June 20, 1964.

s/s Benj. F. Sears
BENJAMIN F. SEARS
Attorney for Appellant

[Certificate of Service]

[Filed April 23, 1964]

ORDER

Plaintiff, by James K. Beazley, having applied to this Court for an extension of time to obtain counsel to represent it in the above entitled action, and plaintiff having represented to the Court that it would require thirty days to communicate its need for funds for the prosecution of this action to its stockholders, and plaintiff having requested that it be allowed a period of thirty days to communicate with its stockholders and solicit and collect the funds needed for the retention of counsel to represent it in the above entitled action, it is this 23rd day of April, 1964,

ORDERED, that plaintiff shall retain counsel and cause such counsel to enter an appearance on its behalf in this action within thirty days from the date hereof, and it is

FURTHER ORDERED, that in the event counsel for the plaintiff shall fail to enter an appearance in this action within thirty days from the date hereof, or shall not be ready to proceed on the argument of defendant's motion for summary judgment now pending, defendant's motion for summary judgment shall be granted and the above entitled action shall be dismissed with prejudice, and it is

FURTHER ORDERED, that this motion be and the same hereby is set for argument on the 25th day of May, 1964.

/s/ Edward M. Curran
Judge

[Certificate of Service]

TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Monday, May 25, 1964

The above-entitled cause came on before the HONORABLE EDWARD M. CURRAN, a U. S. District Judge, at 10:55 a.m., sitting in motions court.

* * * *

2 PROCEEDINGS

THE DEPUTY CLERK: Number 9, Janaf versus Orsinger.

MR. ROSENBERG: My name is Harvey Rosenberg. We just entered our appearance for Janaf, the plaintiff. As Your Honor knows, there were a whole series of cases and we entered our appearance in one about two weeks ago.

Although we don't think that summary judgment can lie, we would like Your Honor to grant us ten days to do some more work. We have only had two weeks in this case and the files are above our heads on the table.

THE COURT: Is there any objection:

MR. DOOLEY: As Your Honor knows, this motion has been pending for six months, and thirty days ago Your Honor brought it to a head by an order directing that the appearance of counsel be filed by the 23rd of May, which was this past Saturday, otherwise the complaint stands dismissed, and in the event that the plaintiff's counsel was not prepared to proceed with argument today, the complaint would stand dismissed.

Now, as I mentioned to Your Honor before, this is the fifth defense of a settlement we made in Judge Hart's chambers three and a half years ago.

3 THE COURT: It will stand dismissed. I just read my order.

MR. ROSENBERG: Your Honor, I am prepared to argue it.

THE COURT: You have not complied with the order. Until you do, you have no standing.

MR. ROSENBERG: I entered my appearance, Your Honor.

THE COURT: You entered it today.

MR. ROSENBERG: Your Honor, I called Mr. Dooley. He knew we were in it on Friday.

THE COURT: I made my ruling. It stands dismissed. I am not going to waste any more time with this case.

MR. ROSENBERG: Your Honor, may I say one more thing?

THE COURT: Yes.

MR. ROSENBERG: The problem with filing the appearance before this is that there is an injunction in 3331 to do anything.

THE COURT: I know. I have been through this before, and so have the other judges in this court.

MR. ROSENBERG: I don't know what I could have done, Your Honor, in violation of that injunction.

THE COURT: I don't know, either.

(Thereupon, the above proceedings were concluded.)

[Filed June 1, 1964]

ORDER

This cause having come on for hearing on the 25th day of May, 1964, on defendant's motion for summary judgment as provided for by order of this Court dated the 23d day of April, 1964, and it appearing that plaintiff was directed by the aforementioned order of the 23d day of April, 1964, to enter an appearance by counsel within thirty days from said date and it appearing that plain-

tiff failed to enter an appearance by counsel within thirty days from the 23d day of April, 1964, it is this 1st day of June, 1964,

ORDERED, that the second amended complaint herein be and the same hereby is dismissed with prejudice.

/s/ Edward M. Curran
Judge

[Certificate of Service]

[Filed June 20, 1964]

NOTICE OF APPEAL

Notice is hereby given that Janaf, Inc., Plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order dismissing Plaintiff's second Amended Complaint with prejudice, granted on Defendant's Motion for Summary Judgment, signed by Judge Edward M. Curran, entered in this action on June 1, 1964.

ROBINSON, ROSENBERG, SHERRY & LEVINS

By /s/ Harvey Rosenberg

By /s/ Peter J. Dooley, Jr.
Attorneys for Janaf, Inc.,
Plaintiff

[Certificate of Service]

---

* * * *

[Filed September 10, 1964]

COUNTER-DESIGNATION OF PORTIONS OF RECORD FOR INCLUSION IN JOINT-APPENDIX

The above-named appellee counter-designates the following portions of the Record for inclusion in the Joint-Appendix:

1. Opposition to defendant's motion filed December 10, 1963.
2. Order granting motion of plaintiff's counsel for leave to withdraw filed January 15, 1964.
3. Copy of letter, Joseph G. Dooley to Henry Lincoln Johnson, dated February 14, 1964.
4. Letter, Joseph G. Dooley to Judge Sirica, dated February 14, 1964.
5. Letter, Henry Lincoln Johnson to Judge Sirica, dated February 14, 1964.
6. Copy of letter, Henry Lincoln Johnson to Joseph G. Dooley, filed March 4, 1964.
7. Letter, Joseph G. Dooley to Judge Sirica, filed March 11, 1964.
8. Copy of letter, Joseph G. Dooley to Janaf, Incorporated, filed March 11, 1964.
9. Copy of letter, Joseph G. Dooley to Henry Lincoln Johnson, filed March 11, 1964.
10. Order denying motion to reconsider, filed June 17, 1964.
11. Transcript of proceedings before Judge Curran, filed June 30, 1964.

JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington 6, D. C.

[Certificate of Service]

* * * *

[Filed October 9, 1964]

MOTION TO DISMISS APPEAL

Comes now the Appellee and moves this Court for an Order to dismiss the above-captioned Appeal for failure of the Appellant to print designated material in the Joint-Appendix.

The grounds of this Motion are more particularly stated in the Affidavit of Joseph G. Dooley, hereunto annexed.

/s/ Joseph Dooley
JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington 6, D. C.

* * * *

[Filed October 27, 1964]

OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

Comes now the Appellant and moves this Court for an Order denying Appellee's Motion to dismiss Appellant's Motion to dismiss Appellant's Appeal.

The grounds for this Motion are set forth herein below.

The Appellant relies upon Blake v. Trainer 79 U.S. App. D.C. 362, 148 F2d 10 which is quoted for the convenience of the Court.

> "It is not necessary that the parties shall agree on what parts of the record shall be printed in the joint appendix but agreement in that respect is encour-

> aged. Each party may print any parts of the record which he desires the court to read in order to decide the questions presented. Unnecessary portions of the record should not be printed."

The Appellant will arrange with the printer to include any or all of the items that the Appellee has designated in Exhibit "B" to his Motion to Dismiss (see Enclosure "A".)

The Joint Appendix contains those items, which after most careful consideration, the Appellant believes are necessary to decide the narrow issues raised by it.

Your Appellant invites the Court's attention to the fact that the Appellee does not contend that any omission claimed by him in any way prejudices him, but instead merely asserts that the Appellant and Appellee were not in agreement as to what should be printed.

Appellant states that it has no objection to any items that the Appellee desires to include.

WHEREFORE, it is respectfully requested that the Appellee's Motion be denied.

BENJAMIN F. SEARS
Attorney for Appellant
1822 - 11th Street, N. W.
Washington, D. C.

BENJAMIN F. SEARS
Attorney at Law

1822 - 11th Street, N. W.
Washington, D. C.

October 28, 1964

Joseph G. Dooley, Esquire
1604 "K" Street, N. W.
Washington, D. C.

Dear Mr. Dooley:

As has been stated to you, it is believed that in view of the narrow issues Appellant has submitted to the Court, i.e., (a) did the Trial Court misapply the effect of the Amendment to Rule 6(a) of the Federal Rules of Civil Procedure and (b) was Counsel for Janaf, Incorporated, denied the opportunity to be heard in opposition to your client's Motion to Dismiss, that the items included in your Counter Designation of Portions of Record for Inclusion in Joint Appendix have no bearing upon and are entirely unrelated to the aforesaid issues.

It would cause additional unnecessary expense to the Appellant which, as you must know, it can ill afford.

However, should you deem otherwise and insist that it be done, it is suggested that Appellant will withdraw the copies submitted to the Court and instruct the printer to include such of the items shown in your Counter Designation as you may now require.

Since the basic Complaint filed in the lower Court alleges that more than 900 members of the Army, Navy and Air Force have been defrauded of real properties valued at more than $10,000,000.00 without a trial on the merits before any Court anywhere, and are *now nearly without funds*, it is urged that you most care-

fully consider your request for the printing of additional items.

It is also suggested that in view of the above that perhaps you may desire to withdraw your Motion to Dismiss.

Very truly yours,

BENJAMIN F. SEARS

Enclosure "A"

* * * *

AFFIDAVIT IN SUPPORT OF APPELLANT'S MOTION TO DENY APPELLEE'S MOTION TO DISMISS APPEAL

Benjamin F. Sears, being first duly sworn, deposes and says:

I am the attorney for the Appellant in the above-captioned Appeal and make this Affidavit in support of the Motion to Deny Appellee's Motion to Dismiss Appeal.

Your Affiant stated to Mr. Dooley that in view of the narrow issue that Appellant intended to raise that the record should be kept to a minimum.

I stated that I would advise him of any change in this position. Since there was no change, I found it unnecessary to further advise Mr. Dooley.

Your Affiant assures the Court that there has been no deliberate departure from the material designated and adds that he will assist him in any manner in taking whatever corrective action may be deemed proper and necessary.

WHEREFORE, it is respectfully requested that an orbe made denying Appellee's Motion.

.....

BENJAMIN F. SEARS
Attorney for Appellant
1822 - 11th Street, N. W.
Washington, D. C.

Subscribed and sworn to before me this day of October, 1964.

.....

Notary Public

My commission expires:

[Certificate of Service]

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OCTOBER TERM, 1964

~~Misc.~~ No. 1037

JANAF, INCORPORATED, *Petitioner,*

v.

VICTOR J. ORSINGER, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH G. DOOLEY
Attorney for Respondent
1604 K Street, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

CASES:

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STATUTES AND RULES:

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Was the dismissal of the petitioner's appeal, by the Court of Appeals for the District of Columbia Circuit, proper?

STATUTES AND RULES INVOLVED

The pertinent statutes and rules involved are subsection 3 of Section 1257 of Title 28 United States Code, Rules 16 (a), 16 (b) and 16 (g) of the Rules of the United States Court of Appeals for the District of Columbia Circuit and Rule 9 (b) of the Rules of the United States District Court for the District of Columbia. The texts are set out in the appendix to this brief.

STATEMENT

The petitioner takes issue with the dismissal of its appeal by the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed for non-compliance with its rules governing preparation of a joint appendix. The order of dismissal is printed at page 8 of the Appendix to the petition herein.*

The Designation of Record in the Court of Appeals (Pet. App. 8-9) discloses, by inspection, that the initial complaint was dismissed on September 18, 1963 (id. No. 5). An amended complaint was dismissed on November 7, 1963 (id. No. 9). Against the second amended complaint, the respondent moved for summary judgment in the District Court (id. No. 11).

That motion was filed on November 22, 1963. Despite the requirements of Rule 9 (b) of the Rules of the District Court, which call for the opposing party to file a "statement of opposing points and authorities" the plaintiff's response consisted of no more than a

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* Omissions from the petitioner's Appendix necessitated the preparation of an Appendix by the Respondent. Throughout this brief references to Respondent's Appendix will be "App. "; references to Petitioner's Appendix will be "Pet App. ".

half page statement denominated "Opposition to Defendant's Motion for Summary Judgment" which set out (App. 1a):

> "that there are genuine issues of fact with an issue by the pleadings, which have never been adjudicated by the United States District Court for the District of Columbia."

The affidavit alluded to in the statement as being "hereunto annexed" was not filed.

The succession of material events, from the date of inception of the litigation, is outlined in Chief Judge McGuire's memorandum to the Clerk of the District Court dated April 8, 1964 (App. 2a, 3a). The memorandum recites the dismissal of two pleadings, each time with leave to amend, counsel's withdrawal and a continuance from March 4, 1964 to April 7, 1964 of the hearing on the motion for summary judgment

> "to allow plaintiff opportunity to obtain counsel. No further continuances to be allowed on the motion. This by Judge Sirica.
>
> "On April 7, 1964, the motion was called before Judge Jones who entered a personal disqualification. Plaintiff at this time was still without counsel.
>
> "It is therefore ordered that plaintiff is given ten days from this date to obtain counsel, in default of which the motion for summary judgment is granted and the cause dismissed with prejudice."

The following day, Chief Judge McGuire rescinded his order and committed the matter to the Motions Court for the purpose of fixing a date for the hearing of the defendant's motion for summary judgment (App. 3a, 4a). At this point the motion had been

pending four and one-half months. On April 23, 1964, District Judge Curran, on the representation of the plaintiff's president (Pet. App. 10) that the plaintiff

> "would require thirty days to communicate its need for funds for the prosecution of this action to its stockholders"

ordered that plaintiff engage counsel and

> "cause such counsel to enter an appearance within thirty days from the date hereof".

In default of appearance or upon failure of counsel to be ready to proceed, the complaint would be dismissed. The motion was set for argument on May 25, 1964 (Pet. App. 10).

On May 25, 1964, counsel filed a belated appearance and requested more time for the preparation for argument (Pet. App. 11), flying directly in the face of the Court's order of thirty-two days before. Respondent's counsel objected, pointing out that the motion had been pending for six months and, further, that the respondent was defending, for the fifth time, a settlement made in District Judge Hart's Chambers three and one-half years previously (id.). District Judge Curran adhered to his order of April 23, 1964 and dismissed the complaint (Pet. App. 12, 13).

If ever a court's patience was tested and if ever a court tolerated delinquencies and delays, in the interest of affording a litigant a fair chance, the District Court did so here. Fully knowing that it must appear by counsel and be ready to proceed, the petitioner offered only a belated appearance by counsel, accompanied by a request for another delay.

On appeal to the Court of Appeals, new counsel appeared. Pursuant to Rule 16 (b), petitioner filed "a statement of the parts of the record" proposed to be printed in the joint appendix (Pet. App. 8, 9). Following the procedure prescribed, respondent here, the Appellee below, counter-designated portions of the record (Pet. App. 14); in bulk the material designated by the petitioner represented many times the quantity of material designated by the respondent. It was respondent's view that the material designated by the petitioner was essential to full consideration, including the merits of the matter, and it was the present respondent's intention to resort to all the material designated and counter-designated in preparation of his brief. Now, the petitioner decided to engraft personal motions on the rules of the Court of Appeals. The appendix filed was a fragment of the appendix the petitioner said it would file.

This self-fabricated procedure prompted the motion to dismiss the appeal. In support of the motion, counsel for the respondent filed an affidavit (App. 5a, 6a), advising the Court that he had contacted both petitioner's counsel and the petitioner's printer by telephone to determine whether the omissions complained of were deliberate or human error. The printer informed counsel that he had printed everything delivered to him; counsel for the petitioner said he, personally, did not know the reason for the omissions and he never called back to say why the omission had occurred.

After defaulting on the motion, petitioner received permission to file opposition, attaching a letter to counsel for the respondent (Pet. App. 17) which demonstrated that the abbreviated appendix was petitioner's

deliberate, unilateral decision, grounded in the thoughts (a) that there was enough there for the Court to decide what it had to decide and (b) doing what the petitioner said it would do in the first instance would "cause additional unnecessary expense."

Petitioner's counsel's affidavit (Pet. App. 18) restated the same position, adding

> "I stated (to Mr. Dooley) that I would advise him of any change in this position. Since there was no change, I found it unnecessary to further advise Mr. Dooley."

Responding to the belated opposition, counsel filed an affidavit (App. 7a, 8a), summing up the petitioner's several defaults since the filing of the Notice of Appeal, namely, (1) the failure to serve a copy of the Designanation of Record—which was corrected only after motion to dismiss, though a letter request had been made, (2) the disregard for the rules relating to the preparation of a joint appendix and (3) the default on the motion.

Evidently, the Court of Appeals felt that there was no compelling reason for further tolerance; the motion to dismiss was granted.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Petitioner Has Not Stated Good Grounds for the Issuance of the Writ

The petition purports to be founded on jurisdiction conferred by Section 1257 (3) of Title 28 of the United States Code. The subsection cited confers jurisdiction to review judgments or decrees of State courts where United States statutes or treaties are questioned on constitutional grounds, where conflict between a State

statute and a Federal statute or the United States Constitution is averred or where rights, privileges or immunities are claimed under the laws or the Constitution of the United States.

The simple question before the Court on this petition is whether a United States Court of Appeals was authorized to dismiss an appeal for deliberate breach of its procedural rules. All the departures which brought about the result were of the petitioner's making. The petitioner did not have to designate as much of the record as it did; it could have designated what it ultimately printed and forced the respondent to print the remaining parts at its own expense. Rule 16 (a) of the Court's rules provides in part:

> "Appellant shall print in the joint appendix the parts of the record which both parties desire printed, but if appellant considers that any parts of the record which appellee desires to print are not material to the questions presented and so notifies the appellee in writing, suitably identifying the parts, the appellee, if he wishes any of those parts printed, shall promptly arrange with appellant's printer for printing them in the joint appendix."

Instead of following the rule, the petitioner waited until the record was struck by designation and counter-designation and then went off on its own to print what it pleased. Now it resorts to Rule 16 (g) which guards against inadvertent omissions and permits him who slipped to make a written request of the clerk for leave to withdraw the joint appendix and correct the mistake.

This, the petitioner never was in a position to do. It had not lapsed; it had made its own rule. Compounding the wrong, instead of requesting the clerk to

make the appendix available for correction, petitioner's counsel wrote to respondent's counsel and said he believed he had done all that needed to be done.

The essence of this petition is extraordinary. It does not and cannot rest upon the section of the Judicial Code which is cited to support it. In reality it rests upon a tacit plea that this Court invalidate, rewrite or circumvent the internal management rules of the Court of Appeals.

Having ignored the District Court's order of April 23, 1964, by failing to file an appearance within the time appointed, having run counter to its directive that counsel be ready to proceed and having never observed the requirement of the local rules concerning the filing of papers in opposition to the motion for summary judgment, the petitioner would now extricate itself by the claim of a right to delay under Rule 6 (a) of the Federal Rules of Civil Procedure.

This claim can hardly be said to meet the criteria of Rule 19 of the rules of this Court which represent the guidelines for the exercise of this Court's discretion. Especially is this so in the setting in which counsel manifested a lack of readiness to proceed, so implicit in the request for another continuance.

2. The Decisions Cited By Petitioner Have No Bearing on the Question Before the Court

Petitioner would sustain its position on the authority of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 1962, 371 U. S. 215, *Thompson* v. *Immigration and Naturalization Service*, 1964, 375 U. S. 384 and *Wolfsohn* v. *Hankin, et al.*, 1964, 376 U. S. 203.

Those cases are not in point. In each of them, the appellants, whose appeals were dismissed by the Court

of Appeals, had relied upon extensions of time granted by the District Court or upon a ruling of the District Court which had led the appealing party to believe that the period for filing a notice of appeal had been tolled.

In the cases cited, the Courts of Appeals had dismissed on jurisdictional grounds; here the Court of Appeals dismissed an appeal within its jurisdiction because of the petitioner's non-compliance with the rules everyone is expected to observe.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the order of dismissal entered by the Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

JOSEPH G. DOOLEY.
Attorney for Respondent
1604 K Street, N. W.
Washington, D. C.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3-63

JANAF, INC., *Plaintiff*

v.

VICTOR J. ORSINGER, *Defendant*

Opposition to Defendant's Motion for Summary Judgment

Comes now the plaintiff, by counsel and opposes the defendant's Motion for Summary Judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure and as grounds therefor states that there are genuine issues of fact with an issue by the pleadings, which have never been adjudicated by the United States District Court for the District of Columbia.

Grounds of this Motion are set forth more fully in the Affidavit of the plaintiff hereunto annexed.

s/s _____
Mark B. Sandground
944 Washington Building
Washington, D. C.
Attorney for Plaintiff

(Certificate of Service)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Washington 1, D. C.

Chambers of
Matthew F. McGuire
Chief Judge

April 8, 1964

Memorandum to the Clerk

In re: Janaf, Inc. v. Victor J. Orsinger, C.A. 3-63

This matter has been pending since January 2, 1963, when the complaint alleging fraud was filed.

On September 13, 1963, after various interlocutory matters had been disposed of it was dismissed for failure to comply with the Federal Rules of Civil Procedure.

On October 31, 1963, a motion to dismiss an amended complaint was argued and granted but the plaintiff was given fourteen days to serve a second amended complaint. This by Judge McGarraghy.

On January 10, 1964, motion for leave to withdraw as counsel for plaintiff was granted.

On March 4, 1964, hearing on motion for summary judgment was continued until April 7 to allow plaintiff opportunity to obtain counsel. No further continuances to be allowed on the motion. This by Judge Sirica.

On April 7, 1964 the motion was called before Judge Jones who entered a personal disqualification. Plaintiff at this time was still without counsel.

It is therefore ordered that plaintiff is given ten days from this date to obtain counsel, in default of which the

motion for summary judgment is granted and the cause dismissed with prejudice. Order accordingly.

MATTHEW F. McGUIRE
Chief Judge

CC—Mr. James K. Beazley
7313 Hogarth Street
Springfield, Virginia

Joseph G. Dooley, Esq.,
1604 K Street, N. W.
Washington, D. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Washington 1, D. C.

Chambers of
Matthew F. McGuire
Chief Judge

April 9, 1964

Memorandum to the Clerk

In re: Janaf, Inc. v. *Victor J. Orsinger, C.A. 3-63*

As of April 8, 1964, a memorandum was addressed to the Clerk of the Court giving plaintiff ten days from that date to obtain counsel, in default of which motion for summary judgment filed by the defendant would be granted and the cause dismissed with prejudice.

As of this date the Court has received a communication, together with data attached, suggesting that "the Court permit adequate time for the Janaf shareholders to contribute the funds necessary to pursue their common cause as may be determined by their own desires in the matter" signed by the President of the plaintiff corporation, James K. Beazley.

In light of these circumstances, therefore, the order above referred to in memorandum form is vacated and it is directed the parties be advised the matter re application for extension of time is to be set down for hearing in the Motions Court.

MATTHEW F. McGUIRE
Chief Judge

CC—Mr. James K. Beazley,
P. O. Box 48,
Annandale, Virginia

Joseph C. Dooley, Esq.,
1604 K Street, N. W.
Washington, D. C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,813

JANAF, INCORPORATED, *Appellant*

v.

VICTOR J. ORSINGER, *Appellee*

Motion to Dismiss Appeal

Comes now the Appellee and moves this Court for an Order to dismiss the above-captioned Appeal for failure of the Appellant to print designated material in the Joint Appendix.

The grounds of this Motion are more particularly stated in the Affidavit of Joseph G. Dooley, hereunto annexed.

JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington 6, D. C.

Affidavit in Support of Appellee's Motion to Dismiss Appeal

Joseph G. Dooley, being first duly sworn, deposes and says:

I am the attorney for the Appellee in the above-captioned Appeal and I make this Affidavit in support of the Motion to Dismiss the above-captioned Appeal for failure of the Appellant to print in the Joint Appendix the material designated and counter-designated by the parties hereto for inclusion in the Joint Appendix.

On August 16, 1964, the Appellant filed a Designation of Portions of the Record for Inclusion in the Joint Appendix. A copy of said Designation is annexed hereto as Exhibit "A". Pursuant to Rule 16 (b) of the Rules of this Court, the Appellee served and filed a counter-Designation, a copy of which is annexed hereto as Exhibit "B".

As appears from the Designation and Counter-Designation, the Appellee listed for printing about one-half as many items as the Appellant. Bulkwise, by comparison, the material designated by the Appellee was negligible. The inclusion, however, of the material designated by both parties is essential for the purpose of testing the correctness of the result in the District Court and I intended to make reference to all such material in my Brief.

On October 7, 1964, the Appellant served a Brief and Joint Appendix. The Joint Appendix contained five items, (a) the Docket entries, (b) an Order of April 11, 1964, which anteceded the Order appealed from, (c) the tran-

script of proceedings before the District Judge, (d) the Order from which the Appeal was taken and (e) the Notice of Appeal.

I contacted Appellant's attorney by telephone for the purpose of determining whether the omissions now complained of represented oversight or a deliberate departure from the material designated by the parties. Appellant's counsel of record advised that an associate prepared the Brief and that he was unable to state the reason for the omissions. He added that he would look into the matter and advise me of his findings and would take corrective action but I had no word from him in the 24 hours since our telephone conversation. Parenthetically, I can add that the printer informed me in telephone conversation that the material printed in the Joint Appendix represented all material delivered to him for printing.

Appellee submits that this Court would unquestionably desire to rest its decision upon consideration of all relevant facts, and not merely on facts submitted in the Joint Appendix which has been filed. The existing Appendix is insufficient for the purpose. In view, therefore, of the Appellant's failure to furnish the facts and failure to print the material it represented it would print, the Appeal is dismissable.

WHEREFORE, it is respectfully requested that an Order be made dismissing the Appeal herein.

JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington, D. C.

Affidavit in Opposition for Leave to File, Time to File Having Expired

Joseph G. Dooley, being first duly sworn, deposes and says:

I am the attorney for the Appellee in the above captioned appeal and I make this affidavit in opposition to the Appellant's Motion For Leave To File Opposition To The Appellee's Motion To Dismiss, The Appellant's Time To File Having Expired.

On October 13, 1964, the Appellee moved to dismiss the appeal for the Appellant's failure to print, in the Joint Appendix, the great bulk of the material the Appellant itself had designated for inclusion and for failure to print the major portion of the material counter-designated by the Appellee. The Appellant did not respond to the motion within the time provided for by the Rules of this Court. When it attempted to lodge its papers in opposition, on or about October 27, 1964, it was informed that it would first have to move for leave to file because its time to do so had expired. I understand that such a motion was filed on October 30, 1964, but, to the date of this affidavit, I have not received a copy of such motion.

Meanwhile, on October 30, 1964, when I received the Appellant's papers in opposition to the Appellee's motion to dismiss, I immediately prepared an affidavit in reply to the Appellant's papers in opposition as I had found significant misstatements of fact in them. The Clerk of the Court suggested that I withhold my reply affidavit pending a disposition of the current motion. Though there has been no receipt of a copy of the Appellant's motion for leave to file, this affidavit is submitted in opposition, with the request that my reply affidavit of October 30, 1964, be considered conjunctively to the end that there be full disposition of all pending motions. Additionally, I have tentative travel commitments and I wish to guard against any default on my part.

It is respectfully submitted that the Appellant's motion for leave to file in opposition to the motion to dismiss should not be granted. This is the third time that the Appellant has failed to comply with the Rules of this Court governing appeals.

On or about August 10, 1964, counsel for the Appellant filed a Statement of Points And Designation of Parts of The Records proposed to be printed in the Joint-Appendix. I did not receive copies of the Statement and Designation and, on August 12, 1964, I wrote a letter to counsel for the Appellant, pointed out the omission and requested that it be corrected. By August 18, 1964, I had not received the Statement and Designation and I moved for an order dismissing the appeal or, alternatively, extending the time to serve and file a counter-designation. On August 24, 1964, counsel served a copy of the Appellant's Designation and Statement of Points and, for that reason, I moved this Court, on August 25, 1964, for leave to withdraw that portion of the earlier motion to dismiss, after an agreement with counsel that my time to counter-designate would be extended to September 4, 1964.

The second failure to comply centered around the failure to file a proper Joint-Appendix. Such failure precipitated the motion to dismiss after counsel for the Appellant had failed to respond to a telephone call. The third occasion of default was the default in filing opposition to the motion to dismiss.

Should the Court consider it appropriate to entertain the motion for leave to file, it is respectfully requested that the Court also consider the reply affidavit in support of the basic motion to dismiss and grant said motion for the reasons stated in said Affidavit.

JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington, D. C.

Rules of United States Court of Appeals for the District of Columbia Circuit

Rule 16 (a) Record to be Printed in Joint Appendix Complete Record Not to be Printed; Joint Appendix to Briefs. The complete record on appeal shall not be printed. Instead the parties shall print as a joint appendix to the briefs (either as an attachment to appellant's brief or as a separate document) the portions of the record which both sides desire the court to read in order to decide the questions presented. Appellant shall print in the joint appendix the relevant docket entries in the district court arranged chronologically in a single column, the complaint and those portions of the pleadings which are relevant to the issues in the case, the judgment or order appealed from and the notice of appeal, together with any findings of fact, conclusions of law, opinion, or charge of the court, and such other parts of the record material to the points on appeal as the appellant desires the court to read in order to decide the questions presented. If appellant contends that the judgment or order is not supported by the evidence, he shall print all material portions of the testimony and evidence. There shall also be printed in the joint appendix such other parts of the record as appellee deems essential for the court to read in order to decide the questions presented. Appellant shall print in the joint appendix the parts of the record which both parties desire printed, but if appellant considers that any parts of the record which appellee desires to print are not material to the questions presented and so notifies the appellee in writing, suitably identifying the parts, the appellee, if he wishes any of those parts printed, shall promptly arrange with appellant's printer for printing them in the joint appendix.

Rule 16 (b) Statements of Appellant and Appellee as to Contents of Joint Appendix. Within 10 days after the filing of the record appellant shall serve and file with the clerk a statement of the parts of the record he proposes to print in the joint appendix. Within 10 days after the filing of appellant's statement, appellee shall serve and file a statement of the parts of the record not included in appellant's statement which appellee desires to have printed in the joint appendix.

Rule 16 (g) Matter Inadvertently Omitted May be Added. If anything material to the appeal is inadvertently omitted from the joint appendix, the clerk on the written request of any party duly served and filed prior to the expiration of the time for filing the reply brief may allow the joint appendix to be released to the printer for the purpose of adding such matter thereto. The request shall suitably describe the additional matter to be printed.

Rule of United States District Court for the District of Columbia

Rule 9. Motions

(b) Points and Authorities; entry of motion, etc.; failure to file opposing points and authorities; oral hearings. With each motion there shall be filed and served a separate paper stating the specific points of law and authorities to support the motion, including a concise statement of material facts. Such statement shall be additional to a statement of grounds in the motion itself, and shall be entered on the docket but shall not be a part of the record. The moving party shall enter the motion and the fact of filing the statement on a card provided by the Clerk. A statement of opposing points and authorities shall be similarly filed, noted and served within five days or such fur-

ther time as the Court may grant. If not filed within the prescribed time the Court may treat the motion as conceded. If a statement in opposition is filed the motion shall be treated as submitted unless an oral hearing is granted by the Judge or Pretrial Examiner.

Section 1257, U. S. C.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.